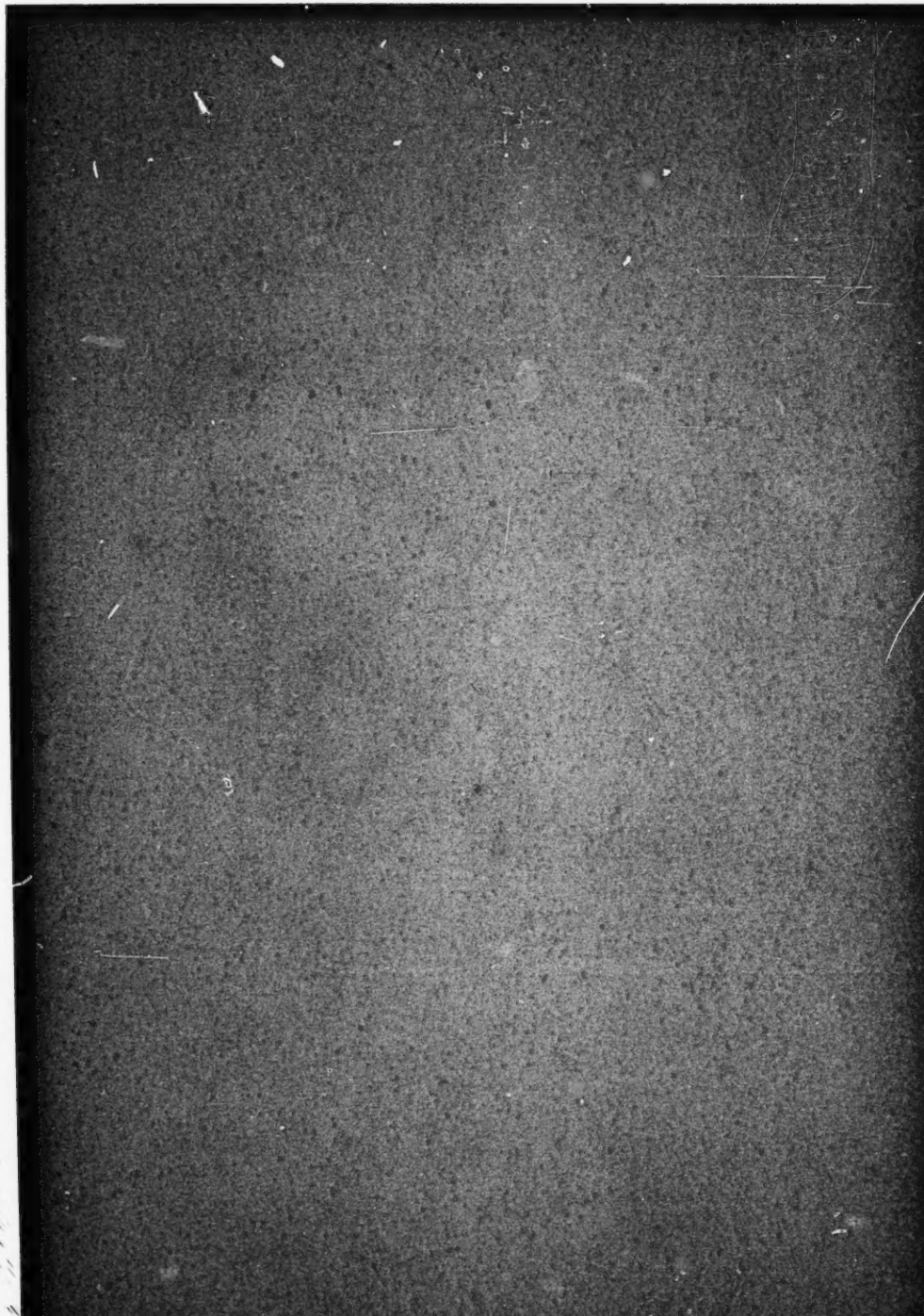

SUPREME COURT, U. S.
FILE
DEC 17 19
MICHAEL ROBAK, JR.

No. 74-609

In the Supreme Court of the United States

OCTOBER TERM, 1974

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADOLPH COORS COMPANY

BRIEF FOR THE ADOLPH COORS COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A in No. 74-128) is reported at 497 F.2d 1178. The opinion of the Federal Trade Commission (Pet. App. B in No. 74-128) is not yet reported. The initial decision of the administrative law judge (Pet. App. C in No. 74-128) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1974. On August 27, 1974, Mr. Justice White extended the time for the Federal Trade Commission to file a petition for writ of certiorari to October 9, 1974, and on October 1, 1974, he granted a further extension to and including November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals improperly set aside the unprecedented provisions in the Commissioners' order requiring Coors to provide the right to arbitrate any termination of any distributor which might occur in the future, whether for cause or not, and requiring the arbitrator to determine whether the termination would constitute a violation of the antitrust laws or the FTC Order.

STATUTE INVOLVED

Section 5(a) and (c) of the Federal Trade Commission Act, 15 U.S.C. 45(a) and (c), provides in relevant part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . .

STATEMENT OF THE CASE

Through its attorneys ("Complaint Counsel") the Federal Trade Commission filed a Complaint against the Adolph Coors Company, hereinafter referred to as "Coors," on June 7, 1971, alleging that Coors had committed certain unfair practices proscribed by the Federal Trade Commission Act.

The unlawful acts and practices charged in the Complaint were that Coors:

1. Fixed and controlled the prices at which its distributors and retailers sell Coors beer;

2. Unlawfully imposed territorial restrictions on its distributors;

3. Required its distributors to require that their retailers serve Coors draught beer exclusively, or not at all;

4. Unlawfully prohibited its distributors from selling and delivering beer to central warehouse accounts; and

5. Unlawfully included thirty- and five-day cancellation periods in all its distributor contracts, and restrained its distributors from freely selling their distributorships to purchasers of their own choosing and at prices freely determined by the seller and buyer.

Extensive hearings were held before an Administrative Law Judge on February 14, 1972, to March 14, 1972, in Denver, Colorado. At this hearing some 70 witnesses, including three expert witnesses testifying on behalf of Coors, appeared with their testimony consuming nearly 3,000 transcript pages, and the parties introduced some 3,000 documentary exhibits into evidence, totaling over 5,000 pages. The hearing itself lasted a full 30 days. On September 15, 1972, the Administrative Law Judge rendered an initial decision in favor of the Adolph Coors Company on every Complaint allegation and dismissed the Complaint.

Complaint counsel then appealed the initial decision of the Administrative Law Judge to the five-member Federal Trade Commission. After oral argument before the Commissioners, and with four commissioners participating, the Federal Trade Commission completely substituted their own findings of fact and conclusions of law for those of the Administrative Law Judge and rendered their own decision, finding in favor of Complaint Counsel on every issue alleged in the Complaint.

The Commission decision and order issued July 24, 1973, was served upon the Adolph Coors Company on August 6, 1973 and Coors filed its Petition to Set Aside in the United States Court of Appeals for the Tenth Circuit on August 15, 1973.

The United States Court of Appeals for the Tenth Circuit heard oral argument on the Petition of Coors on March 19, 1974, and subsequently issued its opinion which so far as the instant Petition is concerned set aside paragraphs 12 and 13 of the said Federal Trade Commission Order.

The termination and arbitration provisions in Paragraphs 12 and 13 of the Commissioners' Decision and Order here are as follows (See Pet. App. B-5-7 in No. 74-128):

12. Cancelling any distributor agreement unless and until the respondent has pursued the following procedure:

A. Cancellation With Cause

(a) Respondent has given the distributor sixty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise. Said notice shall further provide a list of the specified reasons for which the franchise is being terminated;

(c) Said notice will include the assurance that the distributor may sell his interest to a third party during the sixty days, subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract

cancellation reviewed in an arbitration proceeding as hereinafter provided, to ascertain whether the termination has been made otherwise than in good faith and otherwise than for material violation of one or more contract provisions which are relevant to the effective operation of the franchise.

B. Cancellation Without Cause

(a) Respondent has given the distributor one hundred and eighty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith. Said notice shall further provide a list of the specific reasons for which the franchise is being terminated.

(c) Said notice will include the assurance that the distributor may sell his interest to a third party during the one hundred and eighty days subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products, and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract cancellation reviewed in an arbitration proceeding as hereinafter provided to ascertain whether the termination has been made otherwise than in good faith.

13. **IT IS FURTHER ORDERED** that respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a distributor resides, by an independent and neutral arbitrator, to determine in the case of any announced termination, and upon the request of a distributor, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said

termination is made in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise (in the case of termination with cause). The arbitrator shall find that a cancellation of any distributor agreement is not made in good faith if the arbitrator finds that the termination would constitute a *violation of the antitrust laws or this order.* (Emphasis added.)

Said arbitration shall be initiated by respondent within fifteen (15) days from the date of a request by the distributor, which request shall be made not later than fifteen (15) days after notice of proposed cancellation. If respondent fails to provide for arbitration within the time limit, or if the arbitrator finds that cancellation is not proposed in good faith (and for material violation of one or more contract provisions relevant to the effective operation of the franchise in the case of termination for cause), respondent shall reinstate the distributor at the location he held prior to cancellation and shall allow the distributor to reenter into a distributor agreement.

All costs of arbitration, except for the distributor's attorney's fees, shall be borne by respondent, provided, however, that if in the course of arbitration proceeding it is determined by the arbitrator that the distributor's claims are not brought in good faith, the distributor shall bear the costs of arbitration other than the respondent's attorney's fees. The distributor's right to arbitration shall be conspicuously noted in all present and future distributor agreements.

Thus Commission Order paragraphs 12 and 13 require that any termination by Coors of any Coors distributor, whether for "cause" or not, must be submitted to arbitration. These arbitration provisions of the Commission cover claims which have not yet arisen, and the Commissioners' Order requires arbitration at the request of the

distributor only, not by mutual agreement. The arbitrator under the Commissioners' order here must determine whether Coors acted in "good faith" and whether Coors violated "the antitrust laws or this Order" in the termination.

The United States Court of Appeals for the Tenth Circuit held below, adopting the conclusion in this regard of the Administrative Law Judge (See Pet. App. C-181 in No. 74-128), that:

> . . .[t]he termination provisions of Coors and its distributors, based upon their contractural obligations, are a matter of private contract and are not subject to interference by third parties. The termination provisions are reasonable but may not be used by Coors to force any unlawful conduct. Therefore, the Commission's attempt to rewrite Coors' contract termination provisions in paragraphs 12 and 13 of its Order must be set aside. The contract termination provisions do not violate Section 5 of the Federal Trade Commission Act. 497 F. 2d at 1189.

ARGUMENT

1. The Federal Trade Commissioners' Order requiring mandatory arbitration of every termination with six months advance notice of termination, and including arbitration of antitrust issues and whether or not the order of the Federal Trade Commissioners has been violated by the termination, conflicts with a decision of this Court and of decisions of Federal courts of appeal precluding such arbitration.

This court in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953), held invalid a contractural provision requiring arbitration of claims of violation of the Securities Act of 1933, stating:

> This case requires subjective findings on the purpose and knowledge of an alleged violator of the act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the

> arbitrators' conception of [legal requirements] cannot be examined. Power to vacate an award is limited .... The United States Arbitration Act contains no provision for judicial determination of legal issues .... 346 U.S. 435-436.

The United States Courts of Appeals considering the issue have uniformly held that, as here, blanket arbitration provisions requiring arbitration of disputes which might arise in the future to determine whether the antitrust laws have been violated are illegal. *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968); *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546 (7th Cir. 1970); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974). As the United States Court of Appeals for the 5th Circuit held in the *Cobb* case, *supra.*

> Within the last five years, three of the Circuit Courts of Appeals, the Second, Eighth and Ninth Circuits, have addressed questions of the appropriateness of arbitration of issues arising under the federal antitrust laws. All three have decided that claims under the antitrust laws are 'of a character inappropriate for enforcement by arbitration', *American Safety Equipment Corp. v. J. P. Maguire and Co., supra,* 391 F.2d at 825, quoting *Wilko v. Swan*, 2 Cir. 1953, 201 F.2d 439, 444, reversed, 346 U.S. 427, 74 S. Ct. 182, 98 L.Ed. 168. Accordingly, they have fashioned what the District Court in this case characterized as a 'general rule to the effect that antitrust claims are not subject to arbitration'.
>
> * * * *
>
> The *American Safety Equipment Corp.* case outlined three major considerations supporting this rule. The first was a broad range of public interest effected by private antitrust claims. The Court recognized that '[a] claim under the antitrust laws is not merely a private matter', because private antitrust actions are an integral part of the effort of the antitrust laws 'to promote the national interests in a competitive economy'. 392 F.2d at 826. The Second Circuit noted that it is doubtful Congress

> could have 'intended such claims to be resolved elsewhere than in the courts'. Id. at 827. The second is the complexity of the issue and the extensiveness and diversity of the evidence antitrust cases usually involve. These render antitrust claims 'far better suited to judicial than to arbitration procedures'. Id. The third is the questionable propriety of intrusting the decision of antitrust issues to commercial arbitrators, who 'are frequently men drawn for their business expertise', when 'it is the business community generally that is regulated by the antitrust laws'. Id. at 827.
>
> We are persuaded by these considerations. We agree that 'the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome ... clear', *American Safety Equipment Corp.*, 391 F.2d at 828. Accordingly, we join the Second, Eighth, and Ninth Circuits in holding here that, as a general matter, the antitrust claims are not appropriate subjects of arbitration. 488 F.2d at 41.

2. An order of the Federal Trade Commissioners must not only be supported by substantial evidence in the record as a whole, which as this respondent has pointed out in its Petition for writ of certiorari in No. 74-128 is certainly not the case in this matter, but must also be reasonable and necessary based upon the actual findings of violation by the Commissioners. *F.T.C. v. National Lead Co.*, 352 U.S. 419, 77 S. Ct. 502, 1 L.Ed 2d 438 (1957); *Papercraft Corp. v. F.T.C.*, 472 F.2d 927 (7th Cir. 1973).

In *Papercraft Corp. v. F.T.C., supra*, cited to the court of appeals below by the Adolph Coors Company, the court held that a remedy imposed by the Commissioners must be deleted from the order because:

> [W]hen [the Commissioners select] an untried and blunt instrument which will certainly cause some impairment of statutory objectives, we require a more careful exposition of its justification before we will sanction it as a proper remedial tool. The Commission failed to make an

> adequate demonstration [in its findings and decision] of the need for its exceptional remedy. (472 F.2d at 932)

The Federal Trade Commissioners in the Coors case failed to make any findings of justification for the arbitration provisions they drafted, and failed to cite a single authority for same in their order.

The arbitration and termination provisions of paragraphs 12 and 13 of the Commissioners' order are inextricably tied together. The court below could not sanction the redraft of the termination provisions without granting the illegal arbitration provisions. Moreover, the order provisions were not responsive to nor justified by the evidence in the record considered as a whole; were clearly not necessary; were arbitrary and capricious; were in violation of the petitioner's right to liberty and property; and constituted an unprecedented attempt here by the Commissioners to intrude upon the private contract rights of the parties to the distribution agreements.

CONCLUSION

The decision of the United States Court of Appeals below setting aside paragraphs 12 and 13 of the Federal Trade Commission's order is correct. There is no conflict of decisions concerning the authority for such action and, indeed, the decisions on the point clearly support that action of the Court of Appeals below. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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